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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 328

PUROLATOR PRODUCTS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1965

No. 928

PUROLATOR PRODUCTS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF CERTIORARI

Petitioner, Purolator Products, Inc. ("Purolator"), through its counsel, respectfully moves the Court for leave to amend its Petition for a Writ of Certiorari ("Petition"), so as to present the following additional question to the Court:

> 7. Whether the Federal Trade Commission ("FTC") has the power to issue an order to cease and desist where (i) only three Commissioners participated in the decision to issue such order, (ii) only two of these voted in favor of the order in the form in which it was issued, (iii) one of the three entered a dissenting opinion which would have required modification of the order, and (iv) at the

time the order was issued there was one vacancy on FTC and one Commissioner did not participate for the reason that he had not heard oral argument.[1]

Purolator filed the Petition on January 19, 1966. On March 22, 1966 the Court, with consent of counsel for Purolator, extended the Solicitor General's time to file a response to the Petition to and including April 19, 1966.

As grounds for this motion, Purolator's counsel states:

1. Oral argument before FTC in this case was had on June 3, 1963 before Commissioners Anderson, Elman, MacIntyre and Higginbotham. Chairman Dixon was not present (R. 811).[2] The majority opinion, written by Chairman Dixon and joined in only by Commissioner MacIntyre, was issued on April 3, 1964. Newly appointed Commissioner Reilly did not participate because he did not hear oral argument (R. 70). Commissioner Elman dissented (R. 73 et. seq.). Commissioners Anderson and Higginbotham had left FTC and did not participate in the decision. In other words, a majority of a quorum of FTC held against Purolator but neither a majority of FTC's five authorized members nor a majority of its then four members held against Purolator on the issues with respect to which Commissioner Elman dissented.

2. Commissioner Elman was against outlawing any of the challenged parts of Purolator's price structure, which he characterized as "an intricate and finely balanced

1. Even though he did *not* hear oral argument, Chairman Dixon wrote the "majority" opinion. Unlike Commissioner Reilly, he did not disqualify himself.

2. References to R. shall mean the stated page in the Joint Appendix, nine copies of which have been filed by Purolator for this Court's use.

pricing system" (R. 73). Specifically, he was opposed to outlawing either Purolator's 4% internal redistribution discount or the price differentials between "indirect purchaser" jobbers and direct purchasing WDs. Thus, every issue which is presented to this Court in Purolator's Petition, and every issue which was before the court of appeals, was decided adversely to Purolator by only two Commissioners (and only one of these was present for the oral argument).

3. Notwithstanding this lack of concurrence by three Commissioners, Purolator did not ask FTC to reconsider its decision and order for a very good reason. Seven days after the issuance of the Purolator order, FTC held in *The Borden Company,* FTC Dkt. No. 7474, *Order Denying Respondent's Petition for Reconsideration* (April 10, 1964) that a majority of a quorum of FTC is sufficient to sustain the validity of a final order. Therefore, it seemed futile to ask FTC again to consider this point.

4. Purolator did not specifically raise the issue before the court of appeals because of the *Borden* decision and what seemed at the time the settled nature of the law regarding the "majority-of-a-quorum" rule for FTC orders.[3]

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3. The relevant portion of FTC's decision in *Borden* on this issue is relatively short:

> "Three of the five members of the Commission participated in the decision which consists of an opinion and final order. In the absence of statutory provision, these three members constituted a quorum for the transaction of business, in accordance with the Commission's rules. * * * Two of the three members participating concurred in the decision. The Commission being an administrative body, a majority of a quorum is sufficient to sustain the validity of a final order. * * *"

Purolator's petition to the Court of Appeals to review FTC's order was dated June 26, 1964 and its Brief to the court of appeals was filed March 31, 1965. On April 12, 1965, the Sixth Circuit affirmed FTC's "majority-of-a-quorum" rule. *Atlantic Refining Company* v. *FTC,* 344 F. 2d 599, 607 (6th Cir. 1965).

Purolator did, however, present the facts and refer to the unfairness of the 2-1 decision in its Petition to Review (R. 78-79) and Brief to the court of appeals, Brief of Petitioner, p. 8, *Purolator Products, Inc.* v. *FTC*, 352 F. 2d 874 (7th Cir. 1965). For the same reason Purolator did not raise the issue in the Petition before this Court, although it did refer to the 2 to 1 vote on page 4 thereof.

5. On March 16, 1966 the United States Court of Appeals for the Ninth Circuit in *Flotill Products, Inc.* v. *FTC*, —— F. 2d —— (9th Cir. 1966), held that an order of FTC must be supported by at least three Commissioners. (See Appendix, *infra* (printed) pp. 1a to 11a; also 18a)[4] In *Flotill* the Ninth Circuit remanded to FTC that portion of a Robinson-Patman Act order dealing with the "brokerage" charge because the order was issued (exactly as was the order here) by a two to one vote of three Commissioners, with one vacancy on FTC and one Commissioner not participating because he had not heard oral argument. The remand was for further hearings to determine whether a majority of FTC desired to enter such an order. In so acting, the Court expressly overturned a rule which had been in effect for 40 years. (See Appendix, *infra* (printed) p. 8a.)

6. The decision in *Flotill* (Appendix, *infra* (printed) pp. 1a to 11a) sets forth the Ninth Circuit's reasons for holding that FTC may not validly enter an order by vote of less than three commissioners. Nowhere in the Federal Trade Commission Act did Congress provide that FTC could act with the concurrence of less than a majority of its members. The powers delegated to FTC by Congress

4. Counsel for Purolator first became aware of the decision by an article in The Wall Street Journal for March 25, 1966.

are delegated to the "Commission" as such, and not to any lesser group of individual commissioners. Thus cease and desist orders under Section 5 of the Federal Trade Commission Act are to be entered by "the Commission." 15 U.S.C. §45(b). Similarly, final orders entered by FTC under the Clayton Act (as in the present case) are to be entered by "the Commission." 15 U.S.C. §21(b). In no case can an order entered with the concurrence of only two of FTC's five members be said to be an order of "the Commission."

When Congress has desired to give an agency power to act with the concurrence of less than a majority of its members, it has so stated by statute. See, e.g., 5 U.S.C. §133z-15, Reorganization Plan No. 7 of 1961, §102(d) (Federal Maritime Commission); 16 U.S.C. §792 (Federal Power Commission); 29 U.S.C. §153(b) (National Labor Relations Board); 42 U.S.C. §1975(e) (Civil Rights Commission); 49 U.S.C. §17(3) (Interstate Commerce Commission); 49 U.S.C. §1321(c) (Civil Aeronautics Board). No such provision appears in the Federal Trade Commission Act or Clayton Act. Since Congress has not provided that FTC may act without the concurrence of a majority of its members, a final order entered with the concurrence of less than a majority of the Commissioners is *ultra vires* and void.

7. The fact that Purolator did not raise this issue until the decision in *Flotill* was made public, should not preclude it from raising the issue at this time. This Court has held that in similar circumstances a petitioner, such as Purolator, is not precluded from raising such an issue after the advent of intervening authority, despite its failure to raise the issue below. In *Hormel* v. *Helvering*, 312 U. S. 552 (1941), the Board of Tax Appeals had

held against the Commissioner, deciding that certain trust income was not taxable to petitioner under either §166 or §167 of the Revenue Act of 1934. In the court of appeals, the Commissioner abandoned reliance on §166 but not on §167, and argued additionally that the income was also taxable under §22(a). This further argument was predicated on a decision of this Court rendered subsequent to the decision of the Board. Petitioner argued that §22(a) was not at issue because it was not raised before the Board. The court of appeals ruled, however, that §22(a) could properly be considered and held the income taxable thereunder and not under §166 or §167. Petitioner challenged in this Court the power of the court of appeals to pass upon questions not presented before the Board. This Court acknowledged that ordinarily an appellate court does not give consideration to issues not raised below (*Id.* at 556), but stated:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. * * * Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: * * * those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." (*Id.* at 557-59)

The instant proceeding falls squarely within the above principle.

Even in *U. S.* v. *L. A. Tucker Truck Lines*, 344 U. S. 33 (1952), where the "general rule" was followed, this

Court indicated that in cases involving defects in an administrative agency's "power or jurisdiction" to act, the "general rule" should not be followed because, even in the absence of timely objection, the agency's order must be set aside as a nullity, 344 U. S. at 38. The question raised in this motion and in the *Flotill* case obviously involves FTC's "power or jurisdiction" to act.

It is respectfully submitted that this Court should grant the motion to amend Purolator's Petition for Certiorari and either grant the writ on the question presented herein or postpone decision thereon until this Court has passed upon any petition for certiorari which may be filed in the *Flotill* case.[5]

Wherefore, Purolator prays that this motion and the Petition, as amended, be granted.

Respectfully submitted,

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April 1, 1966

5. There being a direct conflict between the Sixth Circuit's decision in *Atlantic Refining supra*, note 3, and the Ninth Circuit's decision in *Flotill*, it seems almost inevitable that a petition for certiorari will be filed in *Flotill*.